IN THE SUPREME COURT OF INDIA

WRIT PETITION (CIVIL) No. 118 OF 2016

IN THE MATTER OF:

Shayara Bano … Petitioner

versus

Union of India & Ors. ... Respondents

WRITTEN SUBMISSIONS ON BEHALF OF THE PETITIONER

A. Brief List of Dates regarding the events leading to the Petition:

11.04.2002	The Petitioner wife married Respondent No.5 at Allahabad as per Muslim Shariat rites. Soon after marriage, the Petitioner was subjected to cruelty including demands of dowry, physical abuse, abortions, as well as the administration of drugs which caused her memory to fade and made her critically ill.
April 2015	Petitioner was driven out of her matrimonial home to return to her parents' house at Kashipur (Uttarakhand) due to additional dowry demands, torturous behavior, and decision of the husband to abandon her. The husband retained the

custody of the two children born out of wedlock.

10.10.2015 The Petitioner was divorced by the pronouncement of Triple Talaq which was confirmed by a divorce deed sent to her by Post. Hence the Petition.

B. Legislative History

1. Muslims in pre-partition India were governed by customary law as also the Muslim Shariat Code.
2. Questions arose on their interplay, interpretation and possible conflict.
3. The Muslim Personal Law (Shariat) Application Act, 1937 (Act No. 26 of 1937) was passed with the following Statement of Objects and Reasons:

> "*For several years past it has been the cherished desire of the Muslims of British India that Customary law should in no case take the place of Muslim Personal Law. The matter has been repeatedly agitated in the press as well as on the platform. The Jamiat-ul-Ulema-i-Hind, the greatest Moslem religious body has supported the demand and invited the attention of all concerned to the urgent necessity of introducing a measure of this effect. Customary Law is a misnomer inasmuch as it has not any sound basis to stand upon and is very much liable to frequent changes and cannot be expected to attain at any time in the future that certainty and definiteness which must be the characteristic of all laws. The status of Muslim women under the so-called Customary Law is simply disgraceful. All the Muslim Women Organisations have therefore condemned the Customary law as it adversely affects their rights. They demand that the Muslim Personal Law (Shariat) should be made applicable to them. The introduction of Muslim Personal Law will automatically raise them to the position to which they are naturally entitled. In addition to this present measure, if enacted, would have very salutary effect on society because it would ensure certainty and definiteness in the mutual rights and obligations of the public. Muslim Personal Law (Shariat) exists in the form of a veritable code and it too well known to admit of any doubt or to entail any great labour in the shape of research, which is the chief feature of Customary Law.*"

4. Section 2 of that Act provided an injunction directed against the court by way of application of “the rule of decision” in deciding cases covered under the said provision.

5. As held in *C. Mohammed Yunus v. Syed Unissa & Others* AIR 1961 SC 808 at Para 10 (pg. 811) as follows:

> “*It is expressly enacted in the Shariat Act as amended that in all questions relating to the matters specified, “the rule of decision” in cases where the parties are Muslims shall be the Muslim Personal Law. The injunction is one directed against the court: it is enjoined to apply the Muslim Personal Law in all cases relating to the matters specified notwithstanding any custom or usage to the contrary. The intention of the legislature appears to be clear; the Act applies to all suits and proceedings which were pending on the date when the Act came into operation as well as to suits and proceedings filed after that date.*”

6. Section 5 of the said Act gave the right to Muslim women to get her marriage dissolved through court of law.

> “*The District Judge may, on petition made by a Muslim married woman, dissolve a marriage on any ground recognized by Muslim Personal Law (Shariat)*”

7. As there were no codified grounds enabling Muslim women to seek dissolution of marriage from court leading to unspeakable misery living in the fear of desertion, the Dissolution of Muslim Marriages Act, 1939 (Act No. 8 of 1939) was enacted with the following object:

"*There is no proviso in the Hanafi Code of Muslim Law enabling a married Muslim woman to obtain a decree from the Court dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her unprovided for and under certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India. The Hanafi Jurists however, have clearly laid down that in cases in which the application of Hanafi Law causes hardship, it is permissible to apply the provisions of the "Maliki, Shafi's or Hambali Law". Action on this principle the Ulemas have issued fatwas to the effect that in cases enumerated in clause 3, Part A of this bill [now see section 2 of the Act] a married Muslim woman may obtain a decree dissolving her marriage. A lucid exposition of this principle can be found in the book called "Heelatun Najeza" published by Maulana Ashraf Ali Sahib who has made an exhaustive study of the provisions of Maliki Law which under the circumstances prevailing in India may be applied to such cases. This has been approved by a large number of Ulemas who have put their seals of approval on the book.*

As the Courts are sure to hesitate to apply the Maliki Law to the case of a Muslim woman, legislation recognizing and enforcing the abovementioned principles is called for in order to relieve the sufferings of countless Muslim women.

One more point remains in connection with the dissolution of marriages. It is this, The Courts in British India have held in a number of cases that the apostasy of a married Muslim woman ipso facto dissolves her marriage. This view has been repeatedly challenged at the bar, but the Courts continue to stick to precedents created by rulings based on an erroneous view of the Muslim Law. The Muslim community has, again and again, given expression to its supreme dissatisfaction with the view held by the court. Any number of articles have been appearing in the press demanding legislation to rectify the mistakes committed by the Court; hence clause 5 is proposed to be incorporated in this Bill. Thus, by this Bill the whole Law relating to

> *dissolution of marriages is brought at one place and consolidated in the hope that it would supply a very long felt want of the Muslim Community in India….*"

8. Section 2 of the said Act provided the various grounds on which Muslim women could seek a decree for dissolution of marriage *inter alia*:

    - Whereabouts of husband unknown for 4 years.
    - Husband's neglect to provide wife's maintenance for 2 years
    - Husband sentenced to imprisonment for 7 years or more.
    - Husband's failure to perform marital obligations for 3 years.
    - Husband continues to be impotent from the time of marriage.
    - Husband's insanity for 2 years or suffers from leprosy of virulent venereal disease.
    - Cruelty by husband.

9. Section 6 of the said Act repealed Section 5 of the 1937 Act which entitled a Muslim woman to get her marriage dissolved through a court of law.

10. Article 13 of the Constitution of India provides:

> "*13. Laws inconsistent with or in derogation of the fundamental rights.*

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
(2) …

(3) In this article, unless the context otherwise requires,-
"law" includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law;
"laws in force" includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.
(4) …"

C. Questions:

1. Whether this Hon'ble Court has the jurisdiction to examine the Constitutional validity of the impugned practices (*talaq-e-bidat*, *nikah halala*, and polygamy) which are under challenge?

2. Whether the impugned practices are not part of the *Shariat* and as such will not be the "rule of decision" under the Muslim Personal Law (Shariat) Application Act, 1937?

3. If in the answer to the above question, the impugned practices are held to be part of *Shariat* and as such part of Muslim Personal Law, whether the impugned practices violate Fundamental Rights guaranteed under Articles 14, 15 and 21 of the Constitution of India?

4. Whether, despite being violative of Articles 14, 15 and 21, the impugned practices are protected by virtue of Article 25(1), 26(b) and 29(1) of the Constitution of India?

5. Whether the impugned practices have been denounced by international recognized organizations as they cause gender discrimination and the impact of India signing and ratifying international treaties including ICCPR, ICESCR & other treaties on the issue of discrimination against women?

6. Whether the All India Muslim Personal Board and similar associations lack the authority to determine and declare the personal law applicable in India for numerous sects and sub-communities of Islam that exist in India and practice Islam in various ways?

7. Whether the gender-neutral divorce is in compliance with the constitutional scheme, international practices and reforms?

D. Submissions:

The aforementioned questions have been answered *in seriatim* as follows:

1. Whether this Hon'ble Court has the jurisdiction to examine the Constitutional validity of the impugned practices (*talaq-e-bidat*, *nikah halala*, and polygamy) which are under challenge?

1.1. Our Constitution makers have provided for Fundamental Rights in Part III and made them justiciable. This Hon'ble Court has declared that judicial review is a basic feature of the Constitution of India.

1.2. In this regard, the decision in *Keshavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, holds immense significance since it re-asserted the role of the judiciary as the protector of the Constitution. As H.R. Khanna J, emphasized at Para 1529:

> "*The power of judicial review is, however, confined not merely to deciding whether in making the impugned laws the Central or State Legislatures have acted within the four corners of the legislative lists earmarked for them; the courts also deal with the question as to whether the laws are made in conformity with and not in violation of the other provisions of the Constitution. Our Constitution-makers have provided for fundamental rights in Part III and made them justiciable. As long as some fundamental rights exist and are a part of the*

> *Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by those rights are not contravened….*
>
> *…. Judicial review has thus become an integral part of our constitutional system and a power has been vested in the High Courts and the Supreme Court to decide about the constitutional validity of provisions of statutes. If the provisions of the statute are found to be violative of any article of the Constitution, which is the touchstone for the validity of all laws, the Supreme Court and the High Courts are empowered to strike down the said provisions."*

1.3. The view was reiterated in *Minerva Mills Ltd. & Ors. v. Union of India & Ors.*, (1980) 3 SCC 625, wherein Chandrachud, CJ, speaking for the majority at Para 21, observed:

> *"It is the function of the Judges, nay their duty, to pronounce upon the validity of laws. If Courts are totally deprived of that power, the fundamental rights conferred on the people will become a mere adornment because rights without remedies are as writ in water. A controlled constitution will then become uncontrolled."*

1.4. The question needs consideration by this Hon'ble Court as the issues relate not merely to policy matters but to Fundamental Rights of women under Article 14, 15 and 21 of the Constitution of India read with international treaties and covenants under which India has various legal obligations. The instant Petition raises questions of great constitutional importance relating to human rights and the Fundamental Rights of Muslim women all over

India, as well as gender discrimination faced by them, and the violation of international treaty obligations in contemporary times. It is submitted that such questions must naturally be decided by this Hon'ble Court.

1.5. In *Pathumma v. State of Kerala*, (1978) 2 SCC 1 it has been observed at Para 5 that:

> "*Courts interpret the constitutional provisions against the social setting of the country so as to show a complete consciousness and deep awareness of the growing requirements of the society, the increasing needs of the nation, the burning problems of the day and the complex issues facing the people which the legislature in its wisdom, through beneficial legislation, seeks to solve. The judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid. It must take into consideration the changing trends of economic thought, the temper of the times and the living aspirations and feelings of the people.*"

1.6. The case of *Ahmedabad Women Action Group v. Union of India*, (1997) 3 SCC 573, cited by All India Muslim Personal Law Board (AIMPLB- Respondent No.8) only discussed previous judgments and, in light of the same, dismissed the public interest litigation. The earlier judgments discussed were of the vintage of 1952 and other judgments from more than two-three decades earlier. The said judgments opined that the time had not yet come and the social climate was not right to accept

the change. In the present case, it is not a public interest litigation seeking a *mandamus* for a legislative enactment but an aggrieved and affected Muslim woman challenging the impugned practices for being violative of her Fundamental Rights.

2. Whether the impugned practices are not part of the *Shariat* and as such will not be the "rule of decision" under the Muslim Personal Law (Shariat) Application Act, 1937?

2.1. The impugned practices are not part of the Shariat and do not have sanction of the Holy Quran. The cases discussed hereinafter buttress this submission.

2.2. In the case of *A. Yousuf Rawther v. Sowramma*, AIR 1971 Kerala 261, the eminent Judge and jurist V.R. Krishna Iyer, J. (as His Lordship then was) held as follows:

> *"6. The interpretation of a legislation, obviously intended to protect a weaker section of the community, like women, must be informed by the social perspective and purpose and, within its grammatical flexibility, must further the beneficent object. And so we must appreciate the Islamic ethos and the general sociological background which inspired the enactment of the law before locating the precise connotation of the words used in the statute.*
>
> *7. ……. Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-Anglian judicial exposition of the Islamic law of divorce has not exactly been just to the Holy Prophet or the Holy Book. Marginal distortions are inevitable when the Judicial Committee in Downing Street has to interpret Manu and Muhammad of India and Arabia. The soul of a culture -- law is largely the formalised and enforceable expression of a community's cultural norms -- cannot be fully understood by alien minds. The view that the Muslim husband enjoys an*

arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions. The statement that the wife can buy a divorce only with the consent of or as delegated by the husband is also not wholly correct. Indeed, a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce and this is a relevant enquiry to apply Section 2(ix) and to construe correctly Section 2(ii) of the Act.

> *"Marriage under Islam is but a civil contract, and not a sacrament, in the sense that those who are once joined in wed-lock can never be separated. It may be controlled, and under certain circumstances, dissolved by the will of the parties concerned. Public declaration is no doubt necessary, but it is not a condition of the validity of the marriage. Nor is any religious ceremony deemed absolutely essential."*
> *(The Religion of Islam by Ahmad A. Galwash, p. 104). It is impossible to miss the touch of modernity about this provision; for, the features emphasised are precisely what we find in the civil marriage laws of advanced countries and also in the Special Marriage Act, Act 43 of 1954. Religious ceremonies occur even in Muslim weddings although they are not absolutely essential. For that matter, many non-muslim marriages, (e.g. Marumakkathayees) also do not insist, for their validity, on religious ceremonies and registered marriages are innocent of priestly rituals. It is a popular fallacy that a Muslim male enjoys, under the Quaranic law, unbridled authority to liquidate the marriage. "The whole Quoran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, "if they (namely, women) obey you, then do not seek a way against them"." (Quaran IV:34). The Islamic "law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no man can justify a divorce, either in the eye of religion or the law. If he abandons his wife or puts her*

away in simple caprice, he draws upon himself the divine anger, for the curse of God, said the Prophet, rests on him who repudiates his wife capriciously." As the learned author, Ahmad A. Galwash notices, the pagan Arab, before the time of the Prophet, was absolutely free to repudiate his wife whenever it suited his whim, but when the Prophet came He declared divorce to he "the most disliked of lawful things in the sight of God. He was indeed never tired of expressing his abhorrence of divorce. Once he said: 'God created not anything on the face of the earth which He loveth more than the act of manumission. (of slaves) nor did He create anything on the face of the earth which he detesteth more than the act of divorce". Commentators on the Quoran have rightly observed -- and this tallies with the law now administered in some Muslim countries like Iraq -- that the husband must satisfy the court about the reasons for divorce. However, Muslim law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Quoran laid down and the same misconception vitiates the law dealing with the wife's right to divorce. Dr. Galwash deduces:

"Marriage being regarded as a civil contract and as such not indissoluble, the Islamic law naturally recognises the right in both the parties, to dissolve the contract under certain given circumstances. Divorce, then, is a natural corollary to the conception of marriage as a contract, ..."

"It is clear, then, that Islam discourages divorce in principle, and permits it only when it has become altogether impossible for the parties, to live together in peace and harmony. It avoids, therefore, greater evil by choosing the lesser one, and opens a way for the parties to seek agreeable companions and, thus, to accommodate themselves more comfortably in their new homes." We have to examine whether the Islamic law allows the wife to claim divorce when she finds the yoke

difficult to endure "for such is marriage without love ..... a hardship more cruel than any divorce whatever". The learned author referred to above states, "Before the advent of Islam, neither the Jews nor the Arabs recognised the right of divorce for women: and it was the Holy Quoran that, for the first time in the history of Arabia, gave this great privilege to women". After quoting from the Quoran and the Prophet, Dr. Galwash concludes that "divorce is permissible in Islam only in cases of extreme emergency. When all efforts for effecting a reconciliation have failed, the parties may proceed to a dissolution of the marriage by 'Talaq' or by 'Khola'. When the proposal of divorce proceeds from the husband, it is called 'Talaq', and when it takes effect at the instance of the wife it is called 'Kholaa'" Consistently with the secular concept of marriage and divorce, the law insists that at the time of Talaq the husband must pay off the settlement debt to the wife and at the time of Kholaa she has to surrender to the husband her dower or abandon some of her rights, as compensation."

2.3. In the case of *Sri Jiauddin Ahmed v. Mrs. Anwara Begum*, (1981) 1 GLR 358, Baharul Islam, J. (later a Judge of this Hon'ble Court) sitting singly, held as follows:

"*6. The first point that falls for consideration is whether there has been a - valid talaq of the wife by the Petitioner under the Muslim Law. 'Talaq' is an Arabic word meaning divorce. It carries the literal significance of 'freeing' or 'the undoing of a knot'. Talaq means divorce of a woman by her husband. Before the advent of Prophet Muhammad the condition of women in the world particularly in Arabia, was very miserable. For all practical purposes worn en were the properties or chattel, as it were, of men. A man could marry any number of wives and could divorce any of them at any time at his whims or caprice, Islam realized that for peace and happiness of a family and for protection and beneficial upbringing of children, divorce was*

undesirable. The Holy Quran put strong restrictions on the divorce of women by their husbands.
Though marriage under the Muslim Law is only a civil contract, yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But in spite of the sacredness of the character of the marriage-tie, Islam recognizes the necessity, in exceptional circumstances, of keeping the way open for its dissolution.

7. There has been a good deal of misconception of the institution of 'talaq' under the Muslim Law. Both from the Holy Quran and the Hadis it appears that, though divorce was permitted, yet the right could be exercised only under exceptional circumstances. The Holy prophet is reported to have said: "Never did Allah allow anything more hateful to Him than divorce". According to a report of Ibn 'Umar' he said; "With Allah the most detestable of all things permitted it divorce" (See the Religion of Islam by Maulana Muhammad All at page 671).
In his commentary on The Holy Quran, Maulana Mohammad Ali has said:

> *"Divorce is one of the institutions in Islam regarding; which much misconception prevails, so much so that even the Islamic Law, as administered in the Courts, is not free from these misconceptions."*

(Quoted by Prof. M.R. Zafer in his paper Unilateral Divorce in Muslim Personal Laws published in Islamic Law in Modern India, by the Indian Law Institute).
The learned author has observed:

> *"Some Muslim jurists and scholars point out that from the very beginning of the recognition of the principle of unilateral divorce, forces had been at work which has restricted and limited its free and unnecessary use."*

As observed by Abdur Rahim:

> *"If the exercise of a particular right is likely to lead to abuses, the law would guard against such a contingency by imposing conditions and limitations. There are certain limitations imposed by the law upon the right of the husband to dissolve the marriage."*

There is a large and influential body of Muslim jurists who regard talaq emanating from the husband as really prohibited except for necessity and only with the sanction of a judge administering the Muslim Law.

8. The learned Magistrate relied on the following observations of the Privy Council in the case of Rashid Ahmed v. Mst. Anisa Khatun reported in 36 C.W.N. 505:

> *"It is not necessary that the wife should be present when the talaq is pronounced."*

We are not concerned with this aspect of the matter. What we are concerned with is whether there was otherwise a valid talaq under the Muslim law.
In the case of Ahmed Kasim Molla v. Khatun Bibi reported in ILR Cal 833 Justice Costello held:

> *"Upon that point, there are a number of authorities and I have carefully considered this point as dealt with in the very early authorities to see whether I am in agreement with the more recent decisions of the Courts. I regret that I have to come to the conclusion that as the Law stands at present, any Mahomedan may divorce his wife at his mere whim and caprice."*

Following Macnaghten who held that "there is no occasion for any particular cause for divorce, and more whim is sufficient"; and justice Batchelor in the case of Sarabat v. Rabiabai ILR 30 Bom 537 he held:

> *"it is good in law, though bad in theology."*

The learned Judge quoted the following from Ameer Ali's Treatise on Mahomedan Law:

> *"The Prophet pronounced talk to be most detestable thing before the Almighty God of all permitted things.*
> *If talk is given without any reason it is stupidity and ingratitude to God."*

He has also quoted from Ameer Ali's Treatise on Mahomedan Law the following passage:

> *"The author of the Multeka (Ibrahim Halebi) is more concise. He says-'The law gives to the man primary the power of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no Musalman can justify a divorce*

either in the eyes of the religion or the law. If he abandons his wife or put her away from simple caprice, he draws upon himself the divine anger, for 'the curse of God', said the Prophet," rests on him who repudiates his wife capriciously."

Costello, J. in his learned judgment has also referred to the case of Asha Bibi v. Kadir Ibrahim Rowther ILR Mad. 22 where Munro and Abdur Rabim, JJ. held:

"No doubt an arbitrary or unreasonable exercise of the right to dissolve the marriage is strongly condemned in the Koran and in the reported sayings of the Prophet (Hadith) and is treated as a spiritual offence. But the impropriety of the husband's conduct would in no way affect the legal validity of a divorce duly effected by the husband."

It may be noticed that the learned Judges, Munro and Amir Ali, in my respectful opinion, advisedly used the expression "Divorce duly effected" in the judgment. No divorce is duly effected if it is in violation of the injunction of the Quran. Costello, J. has also referred to a decision of Privy Council reported in ILR Rule 5, Rangoon 18, in which it has been held:

"According to that law, (that is Muslim Law), a husband can effect a divorce whenever he desires."

But the Privy Council has not said that the divorce need not be duly affected, or no procedure enjoined by the Quran need be followed.

The learned Judge, however, preferred Macnaghten and Batchelor, J. (in (ILR 30 Bom. 537) to Amir Ali and Munro and Abdur Rahim, JJ.)

9. It is, therefore, necessary to refer to the relevant verses of the Holy Quran which is the primary source of the Muslim Law, on the relationship between the husband and wife and divorce of the wife by the husband.

The Holy Quran ordains: (English translation from A. Yusuf Ali's The Holy Quran):

"128. If a wife fears cruelty or desertion on her husband's part, There is no blame on them If they arrange An amicable settlement Between themselves; And such settlement is best;

Even though men's souls Are swayed by greed. But if ye do good And practice self-restraint, God is well-acquainted With all that ye do.

129. Ye are never able to be fair and-just as between women, Even if it is Your ardent desire: But turn not away (From a woman) altogether, So as to leave her (as it were) Hanging (in the air). If we came to a friendly Understanding, and practice Self-restraint, God is Oft-forgiving, Most Merciful,

130. But if they disagree (And must part), God Will provide abundance For all from His All-reaching bounty: For God is He That caret for all And is wise."
(Sura IV, Verses 128 to 130)

The Holy Quran has further ordained:

"229. A divorce is only Permissible twice: after that, The parties should either hold Together or equitable terms, or separate with kindness. It is not lawful for you, (Men), to take back any of your gifts (from your wives), Except when both parties Fear that they would be Unable to keep the limits Ordained by God. If ye (Judges) do indeed Fear, that they would be Unable to keep the limits Ordained by God, There is no blame on either of them if she gives something for her freedom, these are the limits Ordained by God: So do not transgress them. If any do transgress the limits ordained by God. Such persons wrong (Themselves as well as others).

230. So if a husband Divorces his wife (irrevocably), he cannot, after that, Re-marry her until after she has married another husband and He has divorced her, In that case there is No blame on either of them if they re-unite, provided they feel that they can keep the limits Ordained by God. Such are the limits Ordained by God, Which He makes plain to those who under it and.

231. When ye divorce Women, and they fulfill The term of their ('Iddat'), Either take them

back On equitable terms Or set them free With Kindness; But do not take them back To injure them, (or) to take Undue advantage; If any one does that, He wrongs his own soul. Do not treat God's Signs As a jest, But solemnly rehearse God's favors on you, And the fact that He Sent down to you The Book And Wisdom, For your instruction. And fear God, And know that God Is well acquainted With all things.

232. When ye divorce Women, and they fulfill The term of their ('Iddat'), Do not prevent them From marrying Their (former) husbands, If they mutually agree on equitable terms. This instruction is for all amongst you, Who believe in God And the Last Day. That is (the course Making for) most virtue And purity amongst you. And God knows, And ye know not."
(Sura II, Verses 229-232).

10. The learned Commentator, Abdullah Yusuf Ali, commenting on the subject of 'talaq' has observed:

"Islam tried to maintain the married state as far as possible, especially where children are concerned, but it is against the restriction of the liberty of men and women in such vitally important matters as love and family life. It will check hasty action as far as possible and leave the door to reconciliation open at many stages. Even after divorce a suggestion of reconciliation is made, subject to certain precautions against though' less action, A period of waiting (Iddat) For three monthly courses is prescribed, in order to see if the marriage conditionally dissolved is likely to result in issue. But this is not necessary where the divorced woman is a virgin. It is definitely declared that women and men shall have similar rights against each other."

Yusuf Ali has further observed:

"Where divorce for mutual incompatibility is allowed, there is danger that the parties might act hastily, then repent, and again wish to separate. To prevent such capricious action repeatedly, a limit is prescribed. Two divorces (with a reconciliation between) are allowed.

After that the parties must united make up their minds, either to dissolve their union permanently, or to live honorable lives together in mutual love and forbearance to 'hold together on equitable terms, 'neither party worrying the other nor grumbling nor evading the duties and responsibilities of marriage."

Yusuf Ali proceeds:

"All the prohibitions and limits prescribed here are in the interests of good and honorable lives for both sides, and in the interests of a clean and honorable social life, without public or private scandals....

** * **

Two divorces followed by re-union are permissible the third time the divorce becomes irrevocable, until the woman aperies some other man and he divorces her. This is to set an almost impossible condition. The lesson is: if a man loves a woman he should not allow a sudden gust of temper or anger to induce him to take hasty action....

If the man takes back his wife after two divorces, he must do so only on equitable terms, i.e. he must not put pressure on the woman to prejudice her rights in any way, and they must live in clean and honorable lives, respecting each other's personalities...."

The learned Commentator further observes:

"The termination of a marriage bond is a most serious matter for family and social life. An every lawful device is approved which can equitably bring back those who have lived together, provided only there is mutual love and they can live on honorable terms with each other. If these conditions are fulfilled, it is no right for outsiders to prevent or hinder re-union. They may be swayed by property or other considerations."

11. The Holy Quran has ordained a condition precedent to divorce in Sura IV verse 35:

"If ye fear a breach Between them twain, Appoint two arbiters. One from his family, And the other from hers; If they wish for peace; God will cause Their reconciliation: For God

hath full knowledge, And is acquainted With all things"

Thus runs the commentary of Yusuf AH on the above verse:

This is:

"An excellent plan for settling family disputes, without too much publicity or mud-throwing, or resort to the chicaneries of the law. The Latin countries recognize this plan in their legal system. It is a pity that Muslims do not resort to it universally, as they should. The arbiters from each family would know the idiosyncrasies of both parties, and would be able, with God's help, effect a real reconciliation."

Maulana Mohammad Ali has commented on the above verse thus:

"This verse lays down the procedure to be adopted when a case for divorce arises. It is not for the husband to put away his wife; it is the business of the judge to decide the case. Nor should the divorce case be made too public. The Judge is required to appoint two arbitrators, one belonging to the wife's family and the other to the husband's. These two arbitrators will find out the facts but their objective must be to effect a reconciliation between the parties. If all hopes of reconciliation fail, a divorce is allowed. But the final decision rests with the judge who is legally entitled, to pronounce a divorce. Cases were decided in accordance with the directions contained in this verse in the early days of Islam."

The same learned author commenting on the above verse (IV: 35) in his the Religion of Islam has observed:

"From what has been said above, it is clear that not only must there be a good cause for good cause for divorce, but that all means to effect reconciliation must have been exhausted before resort is had to this extreme measure. The impression that a Muslim husband may put away his wife at his mere

caprice, is a grave distortion of the Islamic institution of divorce."

(emphasis added)

Fyzee denounces talaq as "absurd and unjust", Abdur Rabim says:

"I may remark that the interpretation of the law of divorce by the jurists, specially of the Hanafi School, is one flagrant instance where because of literal adherence to mere words and a certain tendency towards subtleties they have reached a result in direct antagonism to the admitted policy of the law on the subject."

12. Mohammad Ali has observed:

Divorce is thus discouraged:

"If you hate them (i.e. your wives) it may be that you dislike a thing while Allah has placed abundant good in it." Remedies are also suggested to avoid divorce so long as possible:

And if you fear a breach between the two (i.e., the husband and the wife), then appoint a judge from his people and a judge from her people; if they both desire agreement, Allah will effect harmony between them."

It was due to such teachings of the Holy Quran that the Holy Prophet declared divorce to be the most hateful of all things permitted... The mentality of the Muslim is to face the difficulties of the married life along with its comforts and to avoid disturbing the disruption of the family relations as long as possible, turning to divorce only as a last resort." The learned author has further observed:

"The principle of divorce spoken of in the Holy Quran and which in fact includes to a greater or less extent all causes, is the decision no longer to live together as husband and wife. In fact, marriage itself is nothing but an agreement to live together as husband and wife and when either of the parties finds him or herself unable to agree to such a life, divorce must follow. It is not, of course, meant that every disagreement between them would lead to divorce; it is only the disagreement to live any more as husband and wife...."

He then refers to the condition laid down in Sura IV verse 35.

The learned author proceeds:

> *"The 'shiqaq' or breach of the marriage agreement may also arise from the conduct of either party; for instance, if either of them misconducts himself or herself, or either of them is consistently cruel to the other, or, as may sometimes happen there is incompatibility of temperament to such an extent that they cannot live together in marital agreement.*
>
> *The 'shiqaq' in these case is more express but still it will depend upon the parties whether they can pull on or not. Divorce must always fellow when one of the parties finds it impossible to continue the marriage agreement and is compelled to break it off. At first sight it may look like giving too much latitude to the parties to allow them to end the marriage contract thus, even if there is no reason except incompatibility of temperament, but this much is certain that if there is such disagreement that the husband and the wife cannot pull together, it is better for themselves, for their offspring and for society in general that they should be separated than that they should be compelled to live together. No home is worth the name wherein instead of peace there is wrangling; and marriage is meaningless if there is no spark of love left between the husband and the wife. It is an error to suppose that such latitude tends to destroy the stability of marriage, because marriage is entered into as a permanent and sacred relation based on love between a man and a woman, and divorce is only a remedy when marriage fails to fulfill its object."*

With regard to the husband's right of pronouncing divorce the learned author has found:

> *"Though the Holy Quran speaks of the divorce being pronounced by the husband yet a limitation is placed upon the exercise of this right."*

He then refers to the procedure laid down in Sura IV Verse 35 quoted above, and says:

> *"It will be seen that in all disputes between the husband and the wife, which it is feared will lead to a breach, two judges are to he appointed from the respective people of the two parties, These judges are required first to*

> *try to reconcile the parties to each other, failing which divorce is to be effected. Therefore, though it is "the husband who pronounces the divorce, he is as much bound by the decision of the judges, as, is the wife. This shows that the husband cannot repudiate the marriage at will. The case must first be referred to two judges and their decision is binding... The Holy Prophet is reported to have interfered and disallowed a divorce, pronounced by a husband, restoring the marital relations (Bu. 68: 2). It was no doubt matter of procedure, but it shows that the authority constituted by law has the right to interfere in matters of divorce."*

The learned author has further observed:

> *"Divorce may be given orally, or in writing, but it must take place in the presence of witnesses."*

13. A perusal of the Quranic verses quoted above and the commentaries thereon by well-recognized Scholars of great eminence like Mahammad Ali and Yusuf All and the pronouncements of great jurists like Ameer Ali and Fyzee completely rule out the observation of Macnaghten that "there is no occasion for any particular cause for divorce, and mere whim is sufficient", and the observation of Batchelor, J. (ILR 30 Bom. 537) that "the whimsical and capricious divorce by the husband is good in law, though bad in theology". These observations have been based on the concept that women wore chattel belonging to men, which the Holy Quran does not brook, Costello, J. in 59 Calcutta 833 has not, with respect, laid down the correct law of talaq. In my view the correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters-one from the wife's family the other from the husband's. If the attempts fail, talaq may be effected.

14. The modern trend of thinking is to put restrictions on the caprice and whim of the husband to give talaq to his wife at any time without giving any reason whatsoever. This trend is in accordance with the Quranic injunction noticed above, namely,

that normally there should be avoidance of divorce, and if the relationship between the husband and the wife becomes strained, two persons-one from each of the parties should be chosen as arbiters who will attempt to effect reconciliation between the husband and the wife; and if that is not possible the talaq may be effected. In other words, an attempt at reconciliation by two relations-one each of the parties, is an essential condition precedent to 'talaq'."

2.4. In the case of *Must. Rukia Khatun v. Abdul Khalique Laskar*, (1981) GLR 375, Baharul Islam, CJ. (later a Judge of this Hon'ble Court) authoring the judgment for a division bench, held in Paragrahps 8 & 11 as follows:

"*8. The learned Magistrate relied on the following observations of the Privy Council in the case of Rashid Ahmed v. Mst. Anisa Khatun reported in 36 C.W.N. 505:*

> *"It is not necessary that the wife should be present when the talaq is pronounced."*

We are not concerned with this aspect of the matter. What we are concerned with is whether there was otherwise a valid talaq under the Muslim law.

In the case of Ahmed Kasim Molla v. Khatun Bibi reported in ILR Cal 833 Justice Costello held:

> *"Upon that point, there are a number of authorities and I have carefully considered this point as dealt with in the very early authorities to see whether I am in agreement with the more recent decisions of the Courts. I regret that I have to come to the conclusion that as the Law stands at present, any Mahomedan may divorce his wife at his mere whim and caprice."*

Following Macnaghten who held that "there is no occasion for any particular cause for divorce, and more whim is sufficient"; and justice Batchelor in the case of Sarabat v. Rabiabai ILR 30 Bom 537 he held:

> *"it is good in law, though bad in theology."*

The learned Judge quoted the following from Ameer Ali's Treatise on Mahomedan Law:

> *"The Prophet pronounced talk to be most detestable thing before the Almighty God of all permitted things.*
>
> *If talk is given without any reason it is stupidity and ingratitude to God."*

He has also quoted from Ameer Ali's Treatise on Mahomedan Law the following passage:

> *"The author of the Multeka (Ibrahim Halebi) is more concise. He says-'The law gives to the man primary the power of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no Musalman can justify a divorce either in the eyes of the religion or the law. If he abandons his wife or put her away from simple caprice, he draws upon himself the divine anger, for 'the curse of God', said the Prophet, rests on him who repudiates his wife capriciously."*

Costello, J. in his learned judgment has also referred to the case of Asha Bibi v. Kadir Ibrahim Rowther ILR Mad. 22 where Munro and Abdur Rabim, JJ. held:

> *"No doubt an arbitrary or unreasonable exercise of the right to dissolve the marriage is strongly condemned in the Koran and in the reported sayings of the Prophet (Hadith) and is treated as a spiritual offence. But the impropriety of the husband's conduct would in no way affect the legal validity of a divorce duly effected by the husband."*

It may be noticed that the learned Judges, Munro and Amir Ali, in my respectful opinion, advisedly used the expression "Divorce duly effected" in the judgment. No divorce is duly effected if it is in violation of the injunction of the Quran. Costello, J. has also referred to a decision of Privy Council reported in ILR Rule 5, Rangoon 18, in which it has been held:

> *"According to that law, (that is Muslim Law), a husband can effect a divorce whenever he desires."*

But the Privy Council has not said that the divorce need not be duly affected, or no procedure enjoined by the Quran need be followed.

The learned Judge, however, preferred Macnaghten and Batchelor, J. (in (ILR 30 Bom. 537) to Amir Ali and Munro and Abdur Rahim, JJ.)

…….

11. The Holy Quran has ordained a condition precedent to divorce in Sura IV verse 35:

"If ye fear a breach Between them twain, Appoint two arbiters. One from his family, And the other from hers; If they wish for peace; God will cause Their reconciliation: For God hath full knowledge, And is acquainted With all things"

Thus runs the commentary of Yusuf AH on the above verse:

This is:

"An excellent plan for settling family disputes, without too much publicity or mud-throwing, or resort to the chicaneries of the law. The Latin countries recognize this plan in their legal system. It is a pity that Muslims do not resort to it universally, as they should. The arbiters from each family would know the idiosyncrasies of both parties, and would be able, with God's help, effect a real reconciliation."

Maulana Mohammad Ali has commented on the above verse thus:

"This verse lays down the procedure to be adopted when a case for divorce arises. It is not for the husband to put away his wife; it is the business of the judge to decide the case. Nor should the divorce case be made too public. The Judge is required to appoint two arbitrators, one belonging to the wife's family and the other to the husband's. These two arbitrators will find out the facts but their objective must be to effect a reconciliation between the parties. If all hopes of reconciliation fail, a divorce is allowed. But the final decision rests with the judge who is legally entitled, to pronounce a divorce. Cases were decided in accordance with the directions contained in this verse in the early days of Islam."

The same learned author commenting on the above verse (IV: 35) in his- the Religion of Islam has observed:

"From what has been said above, it is clear that not only must there be a good cause for divorce, but that all means to effect reconciliation must have been exhausted before resort is had to this extreme measure. The impression that a Muslim husband may put away his wife at his mere caprice, is a

grave distortion of the Islamic institution of divorce."
(emphasis added)

Fyzee denounces talaq as "absurd and unjust", Abdur Rabim says:

"I may remark that the interpretation of the law of divorce by the jurists, specially of the Hanafi School, is one flagrant instance where because of literal adherence to mere words and a certain tendency towards subtleties they have reached a result in direct antagonism to the admitted policy of the law on the subject."

2.5. In *Shamim Ara v. State of Uttar Pradesh & Anr.*, (2002) 7 SCC 518, this Hon'ble Court affirmed the above judgments in paragraph 12, 13 and 14 and held as follows:

"*13. There is yet another illuminating and weighty judicial opinion available in two decisions of the Gauhati High Court recorded by Baharul Islam, J. (later a Judge of the Supreme Court of India) sitting singly in Jiauddin Ahmed v. Anwara Begum [(1981) 1 Gau LR 358] and later speaking for the Division Bench in Rukia Khatun v. Abdul Khalique Laskar [(1981) 1 Gau LR 375]. In Jiauddin Ahmed case [(1981) 1 Gau LR 358] a plea of previous divorce i.e. the husband having divorced the wife on some day much previous to the date of filing of the written statement in the Court was taken and upheld. The question posed before the High Court was whether there has been valid talaq of the wife by the husband under the Muslim law. The learned Judge observed that though marriage under the Muslim law is only a civil contract yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But in spite of the sacredness of the character of the marriage tie, Islam recognizes the necessity, in exceptional circumstances, of keeping the way open for its dissolution (para 6). Quoting in the judgment several Holy Quranic verses and from commentaries thereon by well-recognized scholars*

of great eminence, the learned Judge expressed disapproval of the statement that "the whimsical and capricious divorce by the husband is good in law, though bad in theology" and observed that such a statement is based on the concept that women were chattel belonging to men, which the Holy Quran does not brook. The correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters — one from the wife's family and the other from the husband's; if the attempts fail, talaq may be effected (para 13). In Rukia Khatun case [(1981) 1 Gau LR 375] the Division Bench stated that the correct law of talaq, as ordained by the Holy Quran, is: (i) that "talaq" must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, "talaq" may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay views which, in their opinion, did not lay down the correct law.

14. We are in respectful agreement with the abovesaid observations made by the learned Judges of the High Courts."

3. If in the answer to the above question, the impugned practices are held to be part of *Shariat* and as such part of Muslim Personal Law, whether the impugned practices violate Fundamental Rights guaranteed under Articles 14, 15 and 21 of the Constitution of India?

3.1. As such the Muslim women, since 1939, had a codified right to approach the court for dissolution of their marriage on cogent, relevant, and reasonable grounds as enumerated in the statute, which was in conformity with the sanctity of marriage as an institution.

3.2. In contradistinction thereto, Muslim men are claiming an unqualified, untrammeled, unguided, untested and absolute right by way of the impugned practices to dissolve the Muslim marriage by simply uttering "*Talaq Talaq Talaq*".

3.3. The impugned practice of a Muslim male claiming an unqualified, unguided, untested and an absolute right to dissolve the Muslim marriage is violative of Articles 14, 15(1), and 21 of the Constitution of India being arbitrary, unreasonable and discriminatory on the ground of sex

and gender and also violative of the basic right of a Muslim woman to live with dignity.

3.4. This Hon'ble Court had the occasion to compare laws in India relating to judicial separation, divorce and nullity of marriage in *Ms. Jorden Diengdeh v. S.S. Chopra*, (1985) 3 SCC 62, wherein a prayer for declaration of nullity of marriage or judicial separation was sought under the Indian Divorce Act, 1869 between a Christian wife and a Sikh husband. This Hon'ble Court recognized that laws relating to judicial separation, divorce and nullity of marriage are far from uniform. Thus, it is submitted that only under Mohameddan Law, that the Muslim husband has the unbridled arbitrary entitlement to leave his wife by pronouncing "*Talaq Talaq Talaq*" in a single breath while extensive grounds have been enunciated for the Muslim wife under the Dissolution of the Muslims Marriages Act, 1939. This Hon'ble Court observed in paragraphs 6 & 7, as under:

> *"6. ……. We may add that under strict Hanafi Law, there was no provision enabling a Muslim woman to obtain a decree dissolving her marriage on the failure of the husband to maintain her or on his deserting her or maltreating her and it was the absence of such a provision entailing "unspeakable misery in innumerable Muslim women" that was responsible for the Dissolution of the Muslims Marriages Act, 1939……..*

> *7. It is thus seen that the law relating to judicial separation, divorce and nullity of marriage is far, far from uniform. Surely the time has now come for a complete reform of the law of marriage……."*

3.5. It is submitted that gender justice, and non-discrimination at the very least, is part of the Constitutional morality of India. Commitment to the Constitution of India is a facet of Constitutional morality. It is accordingly submitted that Articles 14 and 21 being the most sacrosanct even among the hallowed Fundamental Rights, any omission or commission that results in the violation of such rights, whether by the State or by non-State actors, violate Constitutional morality.

3.6. A Constitution Bench of this Hon'ble Court in *Manoj Narula v. Union of India, 2014 (9) SCC 1,* expounded on the concept of Constitutional morality (at Paras 74-76) as:

> "*The Constitution of India is a living instrument with capabilities of enormous dynamism. It is a Constitution of India made for a progressive society. Working of such a Constitution of India depends upon the prevalent atmosphere and conditions. Dr. Ambedkar had, throughout the Debate, felt that the Constitution of India can live and grow on the bedrock of Constitutional morality. Speaking on the same, he said: "Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people are yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic." The principle of Constitutional morality basically means to bow down to the norms of the Constitution of India and not to act in a manner which would become violative of the rule of law or reflectible of*

> *action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such a morality. The democratic values survive and become successful where the people at large and the persons-in-charge of the institution are strictly guided by the Constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite Constitutional restraints. Commitment to the Constitution of India is a facet of Constitutional morality.*"

3.7. Constitutional morality strives for gender equality, dignity of women, and abandonment of patriarchal, anachronistic and retrograde practices.

3.8. The reliance placed by AIMPLB on AIR 1952 Bom 84 to submit that personal laws are not subject to be tested on Part III of the Constitution is not applicable to the present case as it only holds that non-codified/ non-statutory personal law cannot be tested on Part III of the Constitution.

3.9. It is submitted that in the present case, by virtue of Section 2 of the 1937 Act, Muslim personal laws are now statutory laws, therefore, the same comes within the expression 'Laws in force' as defined under Article 13 of the Constitution.

3.10. Even otherwise, in the case of Sant Ram and Ors Vs. Labh Singh and Anr. (AIR 1965 SC 314), it has been held that both the definitions of Article 13 (3) would apply in

Article 13(1) and the view taken in AIR 1952 Bom 84 has not been reaffirmed.

3.11. Further in the case on C. Masilmani Mudaliar and Ors. Vs. Idol of Sri Swaminathaswami Swaminathaswami Thirukoil and Ors. (1996) 8 SCC 525, this Hon'ble Court at Para 15 has held;

"It is seen that if after the Constitution came into force, the right to equality and dignity of person enshrined in the Preamble of the Constitution, Fundamental Rights and Directive Principles which are a trinity intended to remove discrimination or disability on grounds only of social status or gender, removed the pre-existing impediments that stood in the way of female or weaker segments of the society. In S.R. Bommai v. Union of India this Court held that the preamble is part of the basic structure of the Constitution. Handicaps should be removed only under rule of law to enliven the trinity of justice, equality and liberty with dignity of person. The basic structure permeates equality of status and opportunity. ***The personal laws conferring inferior status on women is anathema to equality. Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution least they became void under Article 13 if they violated fundamental rights.*** *Right to equality is a fundamental right. Parliament, therefore, has enacted Section14 to remove pre-existing disabilities fastened on the Hindu female limiting her right to property without full ownership thereof. The discrimination is sought to be remedied by Section 14(1) enlarging the scope of acquisition of the property by a Hindu female appending an explanation with it."*

4. Whether, despite being violative of Articles 14, 15 and 21, the impugned practices are protected by virtue of Article 25(1), 26(b) and 29(1) of the Constitution of India?

4.1. Article 25(1) reads as follows:

> "*25. Freedom of conscience and free profession, practice and propagation of religion.*
>
> *(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion….*"

4.2. On a plain reading of the Article 25(1), it is evident that it must yield to the Fundamental Rights guaranteed under Part III, which includes Articles 14, 15 and 21. In *John Vallamattom v. UOI*, (2003) 6 SCC 611, the view was clearly expressed at para 40 that:

> "40. ……. *Article 25 is subject to other provisions contained in Part III of the Constitution of India*"

It was held that:

> "42. ……. *Article 25 merely protects the freedom to practise rituals and ceremonies etc. which are only the integral parts of the religion…….*"

Further, at Para 44, this Hon'ble Court referred to *Sarla Mudgal v. Union of India*, (1995) 3 SCC 635, wherein it was held that:

> "33. ……. *Marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25, 26 and 27……..*"

Thus, it is very clear that marriage and divorce are matters of a secular character and the guarantee enshrined under Articles 25, 26, and 27 of the Constitution of India cannot be relied upon by Muslim men to claim an unbridled, arbitrary, and unilateral right to discriminate against Muslim women.

4.3. Article 25 protects only religious faith, but not practices that run counter to public order, morality and health and to the other provisions of Part III of the Constitution of India. In *Javed v. State of Haryana*, (2003) 8 SCC 369, this Hon'ble Court concurred with the view of the Hon'ble High Court of Gujarat in *R.A. Pathan v. Director of Technical Education*, (1981) 22 Guj LR 289, that there is nothing in the text of the Holy Quran cited before the Court to suggest that contracting plural marriages is either a matter of religious practice among Muslims or a religious belief, and it is certainly not a religious injunction or mandate. This Hon'ble Court also declared (at Para 60) that:

> "60. ……. *What is permitted or not prohibited by a religion does not become a religious practice or a positive tenet of a religion. A practice does not*

> *acquire the sanction of religion simply because it is permitted……..*"

This view was also followed in *Khursheed Ahmad Khan v. State of Uttar Pradesh and Others*, (2015) 8 SCC 439, wherein this Hon'ble Court held (at Para 13), by relying upon *Javed v. State of Haryana* held that:

> "13. *……. what was protected under Article 25 was the religious faith and not a practice which may run counter to public order, health or morality…….. "*

Thus, the impugned practices are not protected since they are neither a positive tenet of Islam nor a religious practice; rather, the impugned practice runs counter to public order, morality, and Articles 14, 15 and 21 of the Constitution of India as well as international conventions and covenants.

4.4. A sharp distinction must be drawn between religious faith and belief on the one hand and religious practices on the other. The Hon'ble Chief Justice Chagla and the Hon'ble Justice Gajendragadkar at Para 5 of their judgment in *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84 opined as follows:

> "5…… *What the state proects is religious faith and beliefs. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole……..*"

4.5. It has been noted *Sarla Mudgal v. Union of India*, (1995) 3 SCC 635 at Para 34 as follows:

> *"It has been judicially acclaimed in the United States of America that the practice of polygamy is injurious to "public morals", even though some religions may make it obligatory or desirable for its followers. It can be superseded by the State just as it can prohibit human sacrifice or the practice of 'Suttee' in the interest of public order. Bigamous marriage has been made punishable amongst Christians by Act (XV of 1872), Parsis by Act (III of 1936) and Hindus, Buddhists, Sikhs and Jains by Act (XXV of 1955).*"

4.6. The impugned practices are neither a matter of religion nor a matter of culture as they are not "an essential and integral part of Islam" and, therefore, the impugned practices cannot be sustained.

4.7. Article 26(b) of the Constitution of India reads as follows:

> "*26. Freedom to manage religious affairs.*
> *Subject to public order, morality and health, every religious denomination or any section thereof shall have the right*
> *(a) ……. ;*
> *(b) to manage its own affairs in matters of religion;*
> *…….*"

4.8. Article 29(1) of the Constitution of India reads as follows:

> "*29. Protection of interests of minorities.*
> *(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.*"

4.9. This Hon'ble Court in *The Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri*

Shirur Mutt, AIR 1954 SC 282, has laid down that only those practices which are “integral to the faith” can get exemption from State intervention. What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. It was observed that the use of the phrase “of its own affairs in matters of religion” suggests that there could be other affairs of a religious denomination or section that are not strictly matters of religion and, to such affairs, the rights guaranteed by Article 26(b) will not apply.

4.10. This Hon’ble Court in *Commissioner of Police v. Acharya Jagdishwarananda Avadhuta* cited at (2004) 12 SCC 770 has held the following in respect of the meaning of the expression “an essential part or practices of a religion”:

> *“9. The protection guaranteed under Articles 25 and 26 of the Constitution is not confined to matters of doctrine or belief but extends to acts done in pursuance of religion and, therefore, contains a guarantee for rituals, observances, ceremonies and modes of worship which are essential or integral part of religion. What constitutes an integral or essential part of religion has to be determined with reference to its doctrines, practices, tenets, historical background, etc. of the given religion. (See generally the Constitution Bench decisions in Commr., H.R.E. v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt [AIR 1954 SC 282 : 1954 SCR 1005] , Sardar Syedna Taher Saifuddin Saheb v. State of Bombay [AIR 1962 SC 853 : 1962 Supp (2) SCR 496] and Seshammal v. State of T.N. [(1972) 2 SCC 11 : AIR 1972 SC 1586] regarding those aspects that are to be looked into*

> *so as to determine whether a part or practice is essential or not.) What is meant by "an essential part or practices of a religion" is now the matter for elucidation. Essential part of a religion means the core beliefs upon which a religion is founded. Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices that the superstructure of a religion is built, without which a religion will be no religion. Test to determine whether a part or practice is essential to a religion is to find out whether the nature of the religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part. There cannot be additions or subtractions to such part because it is the very essence of that religion and alterations will change its fundamental character. It is such permanent essential parts which are protected by the Constitution. Nobody can say that an essential part or practice of one's religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the "core" of religion whereupon the belief is based and religion is founded upon. They could only be treated as mere embellishments to the non-essential (sic essential) part or practices.*

4.11. Essential part of a religion means the core belief on which the religion is founded.

4.12. It is evident from the precedents of this Hon'ble Court that what constitutes "an integral or essential part of the religion" is to be determined with reference to its doctrines, practices, tenets, historical background, etc. To be protected as a religious practice, the practice has to constitute the very essence of that religion, and should be

such that, if permitted, it will change its fundamental character. It is such permanent essential practices which are protected by the Constitution of India. It is also evident that immunity under Article 26(b) is provided not only to matters of doctrines or belief, but extends to acts done in furtherance of religion such as rituals, observances, ceremonies, modes of worship, which are considered to be fundamental parts of the religious practices. Thus, what is required is that the religious practice should be an essential and integral part of it and no other.

4.13. It is obvious that the impugned practices if prohibited will not change the character of Islam for they do not constitute the very essence of Islam. Non-essential religious practices do not have protection under Articles 25 and 26.

4.14. Whether amendment or abrogation of the Muslim personal law infringes Article 29(1) depends on whether the cultural identity of the Muslims rests only or mainly on their personal law. Neither polygamy nor unilateral right to instantaneous divorce by uttering “Talaq” three times in a single breath, can be identified with Muslim culture. As most of the Muslims in India are monogamists and have

not exercised their right to divorce, they would be uncultured if polygamy and arbitrary divorce are regarded as fabric of Muslim culture in modem India.

4.15. That the impugned practices are not an essential tenet of religion is also fortified by the fact that countries based on the theology of the Muslim religion have done away with the impugned practices.

4.16. Islamic Republic of Pakistan[1], People's Republic of Bangladesh[2], Islamic Republic of Afghanistan[3], Morocco[4], Republic of Tunisia[5], Arab Republic of Egypt[6] and Islamic Republic of Iran[7] do not recognize the husband's right to

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[1] Article 2 of the Constitution of the Islamic Republic of Pakistan lays down that "Islam shall be the State religion of Pakistan".

[2] Article 2A of the Constitution of the People's Republic of Bangladesh lays down that "The state religion of the Republic is Islam, but the State shall ensure equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religions."

[3] Article 2 of the Constitution of the Islamic Republic of Afghanist lays down that "The sacred religion of Islam is the religion of the Islamic Republic of Afghanistan. Followers of other faiths shall be free within the bounds of law in the exercise and performance of their religious rituals."

[4] Article 3 of the Constitution of Morocco lays down that Islam is the religion of the State.

[5] Article 1 of the Constitution of the Republic of Tunisia lays down that "Tunisia is a free, independent, sovereign state; its religion is Islam, its language Arabic, and its system is republican. This Article might not be amended."

[6] Article 2 of the Constitution of the Arab Republic of Egypt lays down that "Islam is the religion of the state and Arabic is its official language. The principles of Islamic Sharia are the principle source of legislation."

[7] Article 4 of the Constitution of the Islamic Republic of Iran lays down that "All civil, penal, financial, economic, administrative, cultural, military,

unilaterally divorce through “Triple Talaq” and various other nations have undertaken significant legal reforms in this domain. A compilation of the legal reforms have been submitted by the Union of India in a tabular form at Para 21 of its Counter Affidavit in Writ Petition (Civil) No. 118 of 2016, which is not being reproduced for the sake of brevity.

4.17. In this regard, it is also useful to note that the aforesaid reforms in several other Muslim countries, has neither destroyed the cultural identity nor the religious freedom of the local Muslims. These reforms demonstrate that neither the religion nor the culture of the Muslims is eroded or encroached upon when the state reforms the Muslim personal law.

4.18. It is submitted that *talaq* given by post, or over telecommunications systems (e.g. SMS or WhatsApp), or over the Internet (Email or Facebook), are neither contemplated by the Holy Quran nor permissible, as there are no witnesses in such pronouncement of *talaq*. However, there is no protection for Muslim women of

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political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the fuqaha' of the Guardian Council are judges in this matter.”

India against such arbitrary divorce. Muslim women have their hands tied while the guillotine of divorce dangles, perpetually ready to drop at the whims of their husbands who enjoy undisputed power. Such discrimination and inequality in the form of unilateral *triple-talaq* is abominable when seen in light of the progressive times of the 21st century. Further, once a woman has been divorced, her husband is not permitted take her back as his wife even if he had pronounced *talaq* under influence of any intoxicant, unless the woman undergoes *nikah halala* which involves her marriage with another man who subsequently divorces her so that her previous husband may re-marry her.

4.19. Thus, a Muslim male does not enjoy unbridled authority to liquidate the marriage under the Quaranic law and this tallies with the law now administered in many Muslim countries.

5. Whether the impugned practices have been denounced by international recognized organizations as they cause gender discrimination and the impact of India signing and ratifying international treaties including the UDHR, the ICCPR, the ICESCR, and other treaties on the issue of discrimination against women?

5.1. The provision of the Constitution of India, by virtue of which international law becomes implementable through the municipal laws of India, is Article 51 (c). Article 51 (c) of the Constitution of India enjoins the State *"to endeavour to foster respect for international law and treaty obligations in the dealings of organized peoples with one another."*

5.2. The Government is obliged to strive to achieve the objectives of the international treaty, which has been ratified by it, through Executive or Legislative actions. Further, the Judiciary is free to interpret India's obligations under international law into the municipal laws of the country by pronouncing its decision in cases concerning issues of human rights in international law. Relying upon

Article 51, Sikri, C.J. in *Kesavananda Bharathi v. State of Kerala*, (1973) Supp. SCR 1, observed as under:

> "*It seems to me that, in view of Article 51 of the directive principles, this Court must interpret language of the Constitution of India, if not intractable, which is after all an intractable law, in the light of the United Nations Charter and the solemn declaration subscribed to by India*."

5.3. This Hon'ble Court in *Visakha v. State of Rajasthan*, AIR 1997 SC 3011, took recourse to international convention for the purpose of construction of domestic law and observed:

> "*In the absence of domestic law occupying the field to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution of India and the safeguards against sexual harassment implicit therein. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions to enlarge the meaning and content thereof, to promote the object of the Constitutional guarantee.*"

5.4. The International Covenant on Civil and Political Rights (hereinafter "ICCPR") as well as the International Covenant on Economic, Social and Cultural Rights (hereinafter "ICESCR") acceded to by India on 10.04.1979, both prohibit discrimination on the basis of

gender. Referring to its various judgments discussed above, this Hon'ble Court has already taken the view in *Prakash & Ors. v. Phulavati, & Ors.*, (2016) 2 SCC 36 (at Para 29), that gender discrimination against Muslim women needs to be examined and has also noted, judicially, that laws dealing with marriage and succession are not a part of religion, the law has to change with time, and international covenants and treaties could be referred to examine validity and reasonableness of a provision.

5.5. Article 3 of the Universal Declaration of Human Rights (hereinafter "UDHR") provides that everyone has the right to life, liberty, and security of person. Article 7 thereof provides that everyone is equal before the law and is entitled, without any discrimination, to equal protection of the law. Since the adoption of the UDHR, the universality and indivisibility of human rights have been emphasised and it has been specifically recognised that women's human rights are part of universal human rights. In the year 2000, on the ground that it violates the dignity of women, the United Nations Human Rights Committee considered polygamy a destruction of the internationally binding ICCPR and recommended that it be made illegal in all States. It is, accordingly, submitted that it is well

recognised in international law that polygamy critically undermines the dignity and worth of women. On the same lines, the practices of *talaq-e-bidat* and *nikah halala* also critically undermine the dignity and worth of women.

5.6. Gender equality is one of the key principles of human rights law. Both, the ICCPR and the ICESCR (acceded to by India on 10.04.1979) prohibit discrimination on the basis of gender and guarantee women and men equality in the enjoyment of the rights covered by the said Covenants. Article 26 of the ICCPR provides for equality before the law and equal protection of the law, while Article 2(2) of the ICESCR requires States to guarantee that the rights enunciated in the Covenant can be exercised without any discrimination of any kind including on the lines of gender or religion. Discrimination and inequality can occur in different ways, including through laws or policies that restrict, prefer, or distinguish between various groups of individuals. To achieve true equality, the underlying causes of women's inequality must necessarily be addressed.

5.7. The United Nations Economic and Social Council's Committee on Economic, Social and Cultural Rights explained in its General Comment No.16 of 2005 that the

parties to the ICESCR are obliged to eliminate not only direct discrimination, but also indirect discrimination, by refraining from engaging in discriminatory practices, ensuring that third parties do not discriminate in a forbidden manner directly or indirectly, and taking positive action to guarantee women's equality. It is submitted that failure to eliminate *de jure* (formal) and *de facto* (substantive) discrimination constitutes a violation of the rights of women envisaged in international treaties and covenants. It is further submitted that not only must the impugned practices be declared illegal and unconstitutional, but the actions of religious groups, bodies and leaders that permit and propagate such practices must also be declared illegal and unconstitutional.

6. Whether the All India Muslim Personal Board and similar associations lack the authority to determine and declare the personal law applicable in India for numerous sects and sub-communities of Islam that exist in India and practice Islam in various ways?

6.1. The AIMPLB and Jamiat Ulama-i-Hind are only private organizations. They neither have any statutory or legislative recognition nor are they representatives of Muslim community or interpreters of the tenets/religious practices of Islam. It is not their claim that they are an independent religious denomination or a section thereof, having complete autonomy under Article 26.

6.2. The AIMPLB has no power to frame and enforce rules that may govern Muslim citizens of India, but the AIPMLB nevertheless projects itself in a different light. It is submitted that an association of persons has no legal power or right to dictate or interpret personal law in a democratic nation, especially for non-members.

6.3. Divorce under Muslim personal law needs to be supervised by a court of law or a court-supervised institutional arbitration (as opposed to *maulvis* and religious men recognised only by sub-sections of India's

Muslim community) so as to ensure that such *talaq* is not arbitrary, or declared without witnesses, or not preceded by attempts to reconcile the marriage over three successive *tuhrs* or ninety days as prescribed by the Holy Quran.

6.4. In our democracy, the protection of the sacrosanct Fundamental Rights, as well as matters of secular and legal nature like marriage and divorce, must be supervised only by the courts of law.

6.5. It is reiterated that various Islamic States have undertaken significant legal reforms and have enacted laws to protect Muslim women, including by prescribing detailed procedure for divorce amongst Muslims and establishing special arbitration panels/courts for the purpose.

7. The gender-neutral divorce in compliance with the constitutional scheme, international practices and reforms.

7.1. The Dissolution of Muslim Marriages Act, 1939, emanates from the legislative intent expressed in the Statement of Objects and Reasons of the 1939 Act that it was promulgated to relieve the sufferings of countless Muslim women caused by the husband's negligence to maintain her, desertion, persistent maltreatment, absconding husband leaving the wife without providing for her.

7.2. The legislative intent is further manifested in the line:

> *"Thus by this Bill the whole Law relating to dissolution of marriages is brought at one place and consolidated in the hope that it would supply a very long felt want of the Muslim community in India".*

7.3. Thus, to fortify the legislative intent and purpose, and to make the law of divorce of the Muslim Community in India, he codified law as in the Dissolution of Muslim Marriages Act, 1939, may be read to apply equally to the entire Muslim community, irrespective of gender.

7.4. To achieve the said object, this Court may "read into" the statute, the words "person" instead of "women" and "spouse" for "husband" or "wife". This would make the

grounds for decree for dissolution of marriage encapsulated in Section 2 of the 1939 Act, applicable to Muslim men and women equally to save it from being violative of Article 14 of the Constitution of India.

SETTLED BY: FILED BY:

AMIT SINGH CHADHA,

SENIOR ADVOCATE

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PLACE: NEW DELHI Advocate for Petitioner